

No. 82-2132

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In the Supreme Court of the United States

OCTOBER TERM, 1983

WARREN K. LEWELLEN, ET AL., APPELLANTS

v.

COMMISSIONER OF INTERNAL REVENUE

*ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT*

MOTION TO DISMISS

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The Solicitor General, on behalf of the Commissioner of Internal Revenue, moves, pursuant to Sup. Ct. R. 16(1), that the appeal be dismissed.

1. This is a federal income tax case in which the court of appeals affirmed several essentially factual determinations by the Tax Court related to appellants' farming and real estate operations. Appellants have captioned their filing a "jurisdictional statement," but plainly there are no grounds for invoking the appellate jurisdiction of this Court. Moreover, appellants did not file a notice of appeal, as required by Sup. Ct. R. 10. Accordingly, the appeal should be dismissed for lack of jurisdiction.

2. Treating the papers as a petition for a writ of certiorari (see 28 U.S.C. 2103), the petition should be denied because it fails to present any issue warranting the attention of this Court. The pertinent facts are as follows: petitioners

engaged in a farming operation on certain property owned by them near Bedford, Massachusetts, for a period of 29 years, including the taxable years in issue, 1970-1975. They experimented with different types of crops and farming methods, but never generated a profit, only substantial losses, in all of those years (J.S. App. 10-11). Between 1957 and 1978, they subdivided and sold residential lots from nontillable portions of the Bedford land (*id.* at 15-16). The Commissioner of Internal Revenue determined deficiencies for the years in question, which were sustained by the Tax Court in virtually all respects (*id.* at 8-29).

With respect to the two principal issues, the Tax Court found: (a) that petitioners' farming operation was an "activity not engaged in for profit" within the meaning of Section 183 of the Internal Revenue Code of 1954 (26 U.S.C.) and therefore that they could not deduct the expenses therefrom to the extent those expenses exceeded income generated by the farm; and (b) that the lots sold by them during the taxable years in question were held by them primarily for sale to customers in the ordinary course of a trade or business, within the meaning of the 1954 Code, Section 1221 (26 U.S.C. (& Supp. V)), and therefore that they were not entitled to capital gain treatment of the proceeds (J.S. App. 18-22, 24-26). The court of appeals affirmed the Tax Court in all respects, determining that the Tax Court's factual findings were not clearly erroneous and that its treatment of the issues conformed to the applicable law (*id.* at 1-7).

3. Petitioners do not appear to contest in this Court the rulings of the courts below (see J.S. 7), but they do raise several fact-bound contentions not raised earlier (see J.S. 5-6). These relate to a claimed "late filing" of the Commissioner's notices of deficiency with respect to the years 1970 and 1971 (J.S. 5, Question 1), whether certain of petitioners' transactions, not heretofore put in issue, have been correctly treated by the Commissioner and the courts (J.S. 5-6,

Questions 2-9), and whether arithmetical errors were made in the computation of petitioners' deficiencies (J.S. 8-9).

The "late filing" claim apparently has reference to the statutory limitations period for assessments provided by the 1954 Code, Section 6501 (26 U.S.C. (& Supp. V)). There is nothing in the record, however, to establish that the notices in question were not timely filed. The other contentions also appear insubstantial. In any event, there is no reason for this Court to review issues not raised in the trial court in the absence of unusual circumstances indicating a miscarriage of justice. See, e.g., *United States v. Lovasco*, 431 U.S. 783, 788 n. 7 (1977); *Hormel v. Helvering*, 312 U.S. 552, 556-557 (1941). Here, all the new issues raised by petitioners, other than the "late filing" claim, relate to matters that were stipulated in the Tax Court, and petitioners offer no reason why any of these matters could not have been contested in the Tax Court.

It is therefore respectfully submitted that the appeal be dismissed and, treating the papers as a petition for a writ of certiorari, that the petition should be denied.

REX E. LEE
Solicitor General

JULY 1983